A

KHIUDIN MOHD & ANOR

v.

BURSA MALAYSIA SECURITIES BHD & ANOTHER CASE

B

HIGH COURT MALAYA, KUALA LUMPUR
ROHANA YUSUF J
[JUDICIAL REVIEWS NO: R2-25-467-2010 & R2-25-466-2010]
C 9 FEBRUARY 2012

***ADMINISTRATIVE LAW**: Judicial Review - Application for - Applicants penalised for breach of listing requirements - Powers of Bursa Malaysia - Whether applicants accorded right to be heard - Whether*
D *allowed opportunity to oral hearing - Whether penalties by Bursa excessive, unreasonable and unprecedented - Whether penalties to run until breaches remedied or ceased upon resignation of applicants*

***COMPANY LAW:** Directors - Accounts - Whether duty to ensure*
E *accuracy of financial statements rested with director - Whether applicants discharged duty - Whether failure to discharge obligations under listing requirements amounted to breach - Companies Act 1965, s. 167*

There were two applications for judicial review, one by Gan Boon Aun, the Chief Executive Officer (CEO) of Transmile Group
F Berhad (Transmile) and another by Khiudin Mohd and Shukri Abdul Tawab, the directors and members of the Audit Committee of the Board of Directors of the same company, respectively. The applications were against the respondent's decision, imposing penalties including public reprimands and fines on all the applicants
G as directors of Transmile, a company listed on Bursa's Official List. The applicants were alleged to have committed breaches of listing requirements, resulting in the punishment by the Listing Committee. The Appeals Committee subsequently upheld the decision of the Listing Committee. The respondent, as an
H exchange holding company, is vested with statutory duties under the Capital Markets and Services Act 2007. The respondent acted against the applicants pursuant to listing requirements ('LR') whereas the Securities Commission ('SC') initiated criminal charges against the applicants. Gan Boon Aun was charged pursuant to
I s. 86(b) of the Securities Industry Act 1983 read together with

s. 122C(c). The other two applicants Khiudin Mohd and Shukri Sheikh Abdul Tawab were also faced with charges on the alleged misleading statement relating to the fourth Quarter 2006. The applicants in the instant application sought, *inter alia*, an order of *certiorari* to quash the decision of the Appeals Committee of Bursa Malaysia Securities Berhad. It was the applicants' contention, among others, that (i) simultaneous criminal action by the Securities Commission and the proceedings on breach of listing requirements by Bursa posed real risk of bias against the applicants; (ii) Bursa had breached the rules of natural justice by denial of oral submission before the Appeals Committee and failure to disclose who were the members of the Appeals Committee and (iii) the penalties imposed by Bursa was excessive, unreasonable and unprecedented.

Held (dismissing the applications with costs):

(1) The issues before the court and the issues before the respondent were clearly separate. Before the court, there were criminal charges which required proofs that were different from the one required before the Bursa. The proceedings before Bursa therefore cannot be prejudicial to the applicants in the criminal proceedings. The judge had no cause to admit any evidence from the enforcement proceedings into the criminal case. Further, the power entrusted on Bursa to protect investor's public interest and to ensure public confidence would be defeated if Bursa could not act in a swift manner. (para 17)

(2) The contention of Gan Boon Aun that the financial matters of the company rested with the financial department, the internal and external auditors, were against the main thrust and duty of a CEO. Applying the case of *Australian Securities and Investment Commission v. Healey* (foll) which had set out the duties and roles of directors, it was clear that all the three applicants had failed to discharge their obligations under the listing requirements as directors of Transmile. Further, the submission that Gan Boon Aun had discharged his duties by merely relying on both the internal and external auditors who had purportedly been negligent for failure to detect any defect could not be sustained in the light of the legal duties imposed on directors. (paras 21, 22 & 24)

(3) Section 167 of the Companies Act 1965 imposes obligations on every director and manager to keep accounts and other records to enable true and fair profit and loss accounts and balance sheet of a company. The failure to comply with this provision is an offence under the section. Thus, the submission that matters of finance be left to professionals in the area was untenable when the directors knew or ought to know of the concern relating to the audited annual accounts, in this case. (para 28)

(4) Bursa's enforcement proceedings were premised on documentary evidence and written representations of the parties. The right to natural justice requires a right of fair hearing which cannot be equated with a right to an oral hearing (*Ketua Pengarah Kastam v. Ho Kwan Seng* (refd)). In absence of mandatory rule, the right to oral hearing is not an automatic right. So long as fair opportunities are given to the person, the *audi alter partem* rule is considered observed. On the facts, Bursa had sufficiently accorded the applicants the right to be heard by allowing them to challenge the evidence tendered against them by putting their cases before the Listing Committee orally. Hence, sufficient opportunity was given to all the applicants to present their respective cases, and in the circumstances, the right of hearing has indeed been complied with by Bursa. (paras 31-32)

(5) There was no obligation on Bursa to disclose the names of the members of Appeals Committee. Besides, the applicants had not at any point in time, requested or were interested to know who the members of the Appeals Committee were. For a case of bias to be established, the burden rested on the applicants and the burden to be discharged for allegation of bias in a tribunal is more stringent than in the court. In the instant case, the applicants had not shown any interest or made any request to find out who were the members of the Appeals Committee who deliberated on their appeals, till up to the hearing of the application. (para 45)

(6) Bursa was empowered under para. 16.17(1)(b) of the listing requirements to impose fines not exceeding RM1,000,000. This limit had not been exceeded. Bursa had taken into account the significant variance involved between Transmile's audited

account and restated account as well as the difference between Transmile's unaudited and audited results for financial year ended 31 December 2006. In order to maintain an efficient, well informed competitive market for securities trading, Bursa will have to enforce various rules and regulations pertaining to the conduct of listed companies and in enforcing these rules Bursa has its own internal procedures which it had complied. (paras 47 & 48)

(7) The contention that daily penalty should cease upon resignation was a flawed suggestion. If such was allowed, it would defeat the whole purpose of the enforcement proceedings. The breaches took place when the applicants were in the position to rectify and they must be responsible for their failures. They could not in the face of an action by Bursa resign and claim to be no longer in control of the accounts. It would therefore be appropriate that the penalties run until the breaches are remedied and not after the resignation. (para 51)

Case(s) referred to:

Abdul Rahman Isa v. Public Service Commission [1991] 2 CLJ 972; [1991] 2 CLJ (Rep) 227 HC ***(refd)***

AG v. Times Newspaper Ltd [1973] 3 All ER 54 ***(refd)***

Australian Securities and Investment Commission v. Adler (2002) 41 ACSR 72 ***(foll)***

Australian Securities and Investment Commission v. Healey (2011) 278 ALR 618 ***(refd)***

Bursa Malaysia Securities Bhd v. Gan Boon Aun [2009] 5 CLJ 698 CA ***(refd)***

Capt M Paul Anthony v. Bharat Gold Mines Ltd & Anor [1999] 2 LRI 340 SC ***(refd)***

Cooke v. Goodhew and Others (1991) ALR 447

Jang Bahadur Singh v. Baij Nath Tiwari AIR 1969 30 ***(refd)***

Ketua Pengarah Kastam v. Ho Kwan Seng [1975] 1 LNS 72 FC ***(refd)***

Kwikasair Industries Ltd v. Sydney Stock Exchange Limited BC6800002 (1968) CCH ASLC 30 ***(refd)***

Loot Ting Yee v. Tan Sri Sheikh Hussain Sheikh Mohamed & Ors [1982] CLJ 66; [1982] CLJ (Rep) 203 FC ***(refd)***

Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(refd)***

R v. International Stock Exchange of UK and Ireland Ltd, ex parte Else Ltd [1993] 1 QB 534 ***(refd)***

R v. Michel S Chance Ex Parte Smith & Ors [1995] BCC 1995 ***(refd)***

R v. Nailsworth Licensing Justices ex parte Bird [1953] 2 All ER 652 ***(refd)***
R v. Panel on Take Over and Mergers ex parte Fayed and others [1992] BCLC 938 ***(refd)***
R v. The Executive Council Joint Disciplinary Scheme ex parte Hipps and Others GBD (Crown Office List) 12 June 1996 ***(refd)***
Ridge v. Baldwin [1964] AC 40 ***(refd)***
Rush v. WA Amateur Football League Inc [2005] WASC 206 ***(refd)***
Tan Sri Dato' Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd [2011] 7 CLJ 215 HC ***(refd)***
Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Bhd [2010] 6 CLJ 581 HC ***(refd)***
Teoh Peng Phe v. Wan & Co [2001] 5 CLJ 222 HC ***(refd)***
Tukumaram G Gaokar v. RN Shukla and Others AIR 1968 1050 SC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 167
Rules of the High Court 1980, O. 53
Securities Industry Act 1983, ss. 86(b), 122C(c), 295(4), 296, 297

(Judicial Review No: R2-25-466-2010)
For the applicant - Ambiga Sreenevasan (Yap Chin Ling & Shireen Selvaratnam with her); M/s Song & Partners
For the respondent - Lim Chee Wee (Ruth Garnet Maran with him); M/s Skrine

(Judicial Review No: R2-25-467-2010)
For the applicants - NS Guok (Simon Hong with him); M/s Guok, Leong Hong & Fong
For the respondent - Lim Chee Wee (Ruth Garnet Maran with him); M/s Skrine

Reported by Emm Zehra

JUDGMENT

Rohana Yusuf J:

[1] There are two applications for judicial review. Suit No. R2-25-466-2010 is an application by Gan Boon Aun, who was the Chief Executive Officer (CEO) of Transmile Group Berhad. The applicants in Suit R2-25-467-2010, Khiudin Mohd and Shukri Abdul Tawab were directors and members of the Audit Committee of the Board of Directors of the same company. Both applications arise from the same set of facts and are heard together. The applications for judicial review are made of the respondent's

decision in imposing penalties including public reprimands and fines on all the applicants as directors of Transmile Group Berhad (Transmile). Transmile was a company listed on Bursa's Official List. There were allegations of breaches of listing requirements by Transmile resulting on the punishment meted out by the Listing Committee on the applicants. On appeal the Appeals Committee upheld the decision of the Listing Committee.

[2] The applicants now seek the following orders, pursuant to O. 53 of the Rules of the High Court 1980:

(i) An order of *certiorari* to remove into the High Court and to quash the decision of the Appeals Committee of Bursa Malaysia Securities Berhad dated 6 September 2010 which disallowed the applicant's appeal to the Appeals Committee and upheld the decision of the Listing Committee dated 23 February 2010;

(ii) An order of *mandamus* to compel the Appeals Committee of Bursa to allow the applicants appeal;

(iii) In the alternative to para. (ii) above, an order that the applicants appeals be remitted to Bursa to be heard/deliberated upon *de novo* by a different Appeals Committee on the merits and in accordance with law; and

(iv) An order that enforcement of the decision of the Appeals Committee of Bursa dated 6 September 2010 be stayed until the final disposal of the application herein.

[3] These two applications are premised on the following grounds:

(i) That Bursa erred in law and acted in excess of or without jurisdiction in the Appeals Committee's decision when it proceeded to deliberate on the breaches against the applicants despite the ongoing criminal proceedings against them which could cause a real risk of prejudice;

(ii) That Bursa had breached the rules of natural justice in failing to accord the applicants, oral submissions/representations;

(iii) That Bursa had breached the rules of natural justice in failing to disclose the members of the Appeals Committee, thus depriving the applicants the opportunity to determine if there was potential bias;

(iv) That Bursa had demonstrated bias by singling out the applicants to be penalised for the delay and deviation breaches;

(v) That Bursa had failed to take into account and/or fully appreciate relevant facts in relation to the delay;

(vi) That Bursa had failed to fully appreciate that the applicants could not have known of the seriousness of the audit issue on 15 February 2007 because D&T had not at that time completed its review of certain transactions and therefore could not themselves have known of the seriousness of the audit issues then;

(vii) That Bursa failed to consider sufficiently or at all the applicants position in Transmile and that the applicants had at all times exercised reasonable care and diligence in the circumstances of the case;

(viii) That Bursa failed to take into account and/or fully appreciate relevant facts in relation to the deviation issue;

(ix) That Bursa erred in law, acted in excess of or without jurisdiction when after arriving at the erroneous and perverse decision, Bursa went on to impose penalties that are arbitrary, unjust and without regards to precedent;

(x) That the AC had therefore arrived at a decision that was unreasonable in the circumstances of the case and which was so perverse or devoid of plausible justification that no reasonable person/body of persons could have arrived at the same decision.

[4] There are two alleged breaches by the applicants. Firstly, there was a delay in the submissions of accounts and secondly there was deviation between the financial results announced. The said breaches are as summarised below:

Delay Breaches

Document	Submission Due	Actual Date Date	Delay Submission
AAA 2006	30 April 2007	2 July 2007	42 market days
Annual Report for 2006 **[AR 2006]**	30 June 2007	15 August 2007	33 market days
1st QR 2007	31 May 2007	15 August 2007	54 market days

Deviation Breaches

Financial Year Ended 2005	**Profit/(Loss) after Tax and Minority Interest (RM million)**	**Date of Announcement**
AAA 2005 (Audited)	84.386	27 April 2006
Restated 2005	(369.563)	2 July 2006
Deviation	537.9 %	
Financial Year Ended 2006	**Profit/(Loss) after Tax and Minority Interest (RM million)**	**Date of Announcement**
4th QR 2006 (Unaudited)	157.538	15 February 2007
AAA 2006	(126.329)	2 July 2006
Deviation	180.2 %	

[5] After the hearing before the Listing Committee the applicants each was imposed with the following punishments. These punishments were upheld by the Appeals Committee.

Breach	Penalty Imposed
Delay in submission of the AAA2006	Public Reprimand and Fine of RM21,000
Delay in submission of the 1st QR 2007	Public Reprimand and Fine of RM10,500
Deviation between AAA 2005 & Restated 2005	Public Reprimand and Fine of RM250,000
Deviation between unaudited 4th QR 2006 and audited AAA 2006	Public Reprimand and Fine of RM500,000

Simultaneous Action By Bursa And The Securities Commission

[6] The respondent, as an exchange holding company is vested with statutory duties under the Capital Markets and Services Act 2007. Pursuant to that statutory power it commenced parallel proceedings with the Securities Commission (SC). The respondent acted against the applicants pursuant to listing requirements (LR) and the SC initiated criminal charges against the applicants. Gan Boon Aun was charged pursuant to s. 86(b) of the Securities Industry Act 1983 read together with s. 122C(c). The other two applicants Encik Khiudin Mohd and Encik Shukri Sheikh Abdul Tawab were also faced with charges on the alleged misleading statement relating to the fourth quarter 2006.

[7] The first ground of challenge advanced by the applicants is grounded on the simultaneous criminal action by the Securities Commission and the proceedings on breach of listing requirements by Bursa against the applicants. The action by Bursa was said to pose real risk of bias against the applicants. Learned counsel for the applicants Dato' Ambiga Sreenevasan, (Cik Yap Chin Ling and Cik Shireen Selvaratnam with her) for Gan Boon Aun and Encik NS Guok (Encik Simon Hong with him) for Khiudin Mohd Said and Shukri Sheikh Abdul Tawab, contended that the Appeals Committee (AC) erred in refusing to allow the applicants' appeal on the grounds of sub-judice and potential prejudice posed against them in the criminal proceedings by SC.

[8] To appreciate this argument it must be made clear that the proceedings by Bursa against the applicants under the listing requirements were predicated on the issue that the applicants have knowledge or expected to have knowledge that there were open audit issues relating to the account of 2006. The issue to be determined therein is whether necessary steps were taken to address the audit issues, and whether there was compliance with timely submission of the audited annual account of 2006. The criminal charges however, concern on the issue of whether the applicants participate or have knowledge in the preparation of the account. These in my view are two separate issues.

[9] In the action by Bursa there is no requirement to establish criminal element. The main issue to be determined in the case before Bursa was whether the fourth quarter 2006 account was factual, clear, unambiguous, and accurate and contains sufficient information to enable informed investment decision by the public. Under the law Bursa is mandated with the objective of maintaining an efficient, well informed and internationally competitive market for trading of securities. This very objective at the same time necessitates that Bursa takes swift and deterrent enforcement action.

[10] The issue therefore is how are the applicants prejudiced in the criminal trial in the face of the action by Bursa against them. Lord Denning MR in *AG v. Times Newspaper Ltd* [1973] 3 All ER 54, described sub-judice in the following terms:

> When litigation is pending and actively in suit before the court, no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action, as for instance by influencing the judge, the jurors, or the witnesses, or even by prejudicing mankind in general against a party to the cause.

[11] He further elaborated that even if the person who makes comments believes it to be true it would still be contempt of court for him to pre-judge a case before it is ascertained in the proceedings. Underlying this is the rule of fair trial. To maintain the integrity of the law therefore there should not be trial by other medium such as the newspaper, or television when the case or the litigation is pending and actively in suit before the court. The test to be applied according to him is that there must be "a real and substantial danger of prejudice".

[12] The case of *R v. Panel on Take Over and Mergers ex parte Fayed and others* [1992] BCLC 938, illustrates the point of bias when considering an application for stay of civil proceedings. It was held that the court have the power to intervene, to prevent continuation of one set of proceedings. This power however, should only be exercised where there is a real risk that those proceedings would prejudice the trial of the other proceedings. A pending disciplinary action before the panel of take over and mergers in that case, was found not to be prejudicial to the trial before the court. In that case it was emphasised that it would particularly be so, when the action in court is heard and tried by a judge and not a jury.

[13] In *R v. Michel S Chance Ex Parte Smith & Ors* [1995] BCC 1995 a stay application was brought by a firm of chartered accountants to stay disciplinary proceedings commenced by the Executive Council of Joint Disciplinary Scheme of the Institute of Chartered Accountants on account that the client had filed a civil action. It was dismissed by the court. In dismissing the stay application it was observed that, if disciplinary proceedings designed to address public concern are stayed pending resolution of civil proceedings, it would be doubtful if that public concern can be met when it has to wait prior resolution of those proceedings. It was also deliberated that when dealing with public concern, (being an auditing process in that case) there will usually be overlapping facts between the issues in civil proceedings and under the disciplinary scheme. However, the court held that it should not be allowed to blur the different functions and different objectives of the two types of proceedings. (See *R v. The Executive Council Joint Disciplinary Scheme ex parte Hipps and Others GBD (Crown Office List)* 12 June 1996).

[14] The Indian Supreme Court in *Tukumaram G Gaokar v. RN Shukla and Others* AIR 1968 1050 (SC) took a similar position. The case involved an application for writ of prohibition restraining threatened proceedings that would impose a penalty for alleged complicity in gold smuggling. The application was based on the ground of contempt of a trial relating to an offence in connection with smuggling before a Magistrate. The court rejected the application firstly, because it could not constitute contempt since the proceedings was made in good faith. The plea for contempt on the ground of initiation of disciplinary proceedings during

pendency of a criminal case on the same facts was also rejected by the Indian Supreme Court in *Jang Bahadur Singh v. Baij Nath Tiwari* AIR 1969 30. (see also *Capt M Paul Anthony v. Bharat Gold Mines Ltd & Anor* [1999] 2 LRI 340 SC).

[15] The Federal Court in *Loot Ting Yee v. Tan Sri Sheikh Hussain Sheikh Mohamed & Ors* [1982] CLJ 66; [1982 CLJ (Rep) 203 referred to *Jang Bahadur Singh* and held that the initiation and continuation of disciplinary proceedings in good faith do not obstruct or interfere with the cause of justice in the pending court proceedings. The Federal Court of Australia in *Cooke v. Goodhew and Others* (1991) ALR 447 echoed the same position and observed that it must be assumed that no judge would be influenced with what he had read of a case.

[16] In the final analysis all these cases emphasise that the court recognise the separate function and role of the statutory bodies, as well as the concurrent right of the statutory bodies to exercise powers and duties, provided such exercise of power is made *bona fide*. A statutory body cannot be held for contempt of court when it exercises its powers in good faith. The court therefore should be slow to interfere unless there is a real risk of serious prejudice. Whether or not there is a real risk of serious prejudice will depend on the facts of each case and it must be balanced against the interest of public at large.

[17] Returning to the present case, the issues before the court and the issues before the respondent are clearly separate. Before the court, there were criminal charges which require proofs that are different from the one required before Bursa. The proceedings before Bursa therefore cannot be prejudicial to the applicants in the criminal proceedings since firstly, they are before a judge which requires different standard and question of proof. The judge has no cause to admit any evidence from the enforcement proceedings into the criminal case. Further, the power entrusted on Bursa to protect investors' public interest and to ensure public confidence would be defeated if Bursa cannot act in a swift manner. It will then stifle its role as a body to ensure and maintain a credible and transparent capital market, in order to ensure investors' confidence to invest.

[18] In view of the above position, I agree with the argument of learned counsel for the respondent Encik Lim Chee Wee (Cik Ruth Garnet Maran with him) that there is no sub-judice in the action taken on the breach of listing requirements pending criminal charges in the present case.

The Breaches

[19] The two main allegations of breaches against the applicants are essentially the delay in the submission of account and deviation between the financial results.

[20] Learned counsel for applicants contended that as the CEO, Gan Boon Aun's function was mainly focussed on day to day business operation. He also spent a lot of time oversees in the course of his duties. Financial matters were overseen by Audit Committee comprising three directors and a Chief Financial Officer, Encik Lo Chok Ping (for almost the last ten years) assisted by the entire Finance Department. There was also internal auditor namely Moores Rowland Risk Management Sdn Bhd engaged for over seven years and the external auditors Delloite & Touche since the last three years. Relying on the case of *Teoh Peng Phe v. Wan & Co* [2001] 5 CLJ 222, it was submitted by the applicants that the external auditor has a role to certify the company's account, detect errors and detect fraud. Essentially the contention of learned counsel is in fact placing reliance on professional in the financial advisers of the company.

[21] The contention of Gan Boon Aun that the financial matters of the company rests with the financial department, the internal and external auditors in my view ignores the legal duties of directors in relation to financial statement of companies.

[22] This contention goes against the main thrust and duty of a CEO. A CEO and a director have duties to exercise care and diligence in the exercise of their functions in the company. The duties of directors in relation to approval of financial statement was recently dealt with by the Federal Court of Australia in the case of *Australian Securities and Investment Commission v. Healey* (2011) 278 ALR 618. Reliance on advice of management and auditors was rejected by the Federal Court of Australia in that case when it held that relying on the expert did not *per se* discharge directors from their duties. Reasonable steps must be

taken which requires each individual to take up upon themselves the responsibilities which commensurate with their roles in relation to reading and understanding the financial statement. Complexities and volume cannot be an excuse.

[23] The court in that case also explained the duties and roles of directors as clearly and neatly summarised by learned counsel for the respondent in his written submission to be as follows:

(i) There is a core, irreducible requirement of directors to be involved in the management of the company and take all reasonable steps to be in a position to guide and monitor;

(ii) A director has the responsibility to familiarise himself with the fundamentals of the business of the company and is under a continuing obligation to keep himself informed about the activities of the company and to be familiar with its financial position by a regular review and understanding of its financial statements;

(iii) The objection duty of competence requires a director to have the ability to read and understand financial statements and to at least, understand the terminology and the meaning of the concepts used in them;

(iv) A reading financial statements by directors is not merely for the purposes of correcting typographical or grammatical errors or even immaterial errors of arithmetic but for a more important purpose, that is, to ensure, as far as possible and reasonable, that the information included therein is accurate;

(v) All directors must carefully read and understand financial statements before they make a declaration under s. 295(4) to opine whether the financial statements and notes comply with applicable accounting standards (s. 296) and whether the financial statements give a true and fair view (s. 297). Such a reading and understanding requires a director to consider whether the financial statements are consistent with his own knowledge of the company's financial position, that is, the knowledge which he has accumulated from carrying out his role and function of a director;

(vi) Even where a director has gone through the financial statements "line by line", he may still not have taken all reasonable steps, if he has not focused upon the task of considering the statutory requirements and of applying the knowledge that he has of the affairs of the company;

(vii) A director, whatever his background, has a greater duty than that of simply representing a particular field of experience or expertise. He is not relieved of the duty to pay attention to the company's affairs which might reasonably be expected to attract inquiry, even outside the area of the director's expertise;

(viii) Although the directors may rely on the advice given by the management or auditors, they cannot rely on others where they know, or by the exercise of ordinary care should know, facts that would deny such reliance.

[24] From the disclosed facts in the present case, all the three applicants failed to discharge their obligations under the listing requirements as directors of Transmile. The submission that Gan Boon Aun had discharged his duties by merely relying on both the internal and external auditors who had purportedly been negligent for failure to detect any defect cannot be sustained in the light of the legal duties imposed on directors. His pure reliance is unreasonable in fact, looking at the notification by Delloitte of the audit concern on 15 February 2007. The enforcement action against all the applicants centred on the events transpired on 14 February 2007 and 15 February 2007, when Transmile was supposed to have released its Fourth Quarterly Report for year ending 2006 which was due by end February 2007.

[25] There was some audit concern prior to the issuance of the Fourth Quarter Results 2006 (which was authorised by the Board on 15 February 2007,) that reported a net profit of RM157,538 million. As a result of the audit concern the audited annual accounts (AAA) for year 2006 could not be finalised within time. The applicants contended that the Board was not informed of the concern despite being raised by Delloite in the Audit Committee meeting on 14 February 2007. As the AAA cannot be finalised before end of April 2007 the company applied for extension of time but it was disallowed by the respondent. The company

appointed its internal auditor Moores Rowland Sdn Bhd to examine and address the concern. A special interim Audit Report was announced on 30 May 2007 stating the following:

(i) The Audit Committee and the CEO was fully informed of audit concerns;

(ii) Overstatement of RM333 million in the Fourth Quarter Results 2006;

(iii) Overstatement of consolidated revenue of financial year ended 31 December 2005 of RM197 million.

[26] The above report clearly confirmed that the Audit Committee and the CEO was fully aware of the audit concerns. The final subsequent report was finally made on 14 June 2007 which resulted in adjustment to be made to the AAA 2005 showing in fact a loss of RM369,363. The adjustment was filed with the Bursa. The AAA 2006 report filed on 2 July 2007 deviated more than 30% from the announced Fourth Quarter Result earlier announced. Resulting from these facts the Listing Committee issued the charges against the applicants for four charges of:

(a) Delay in filing AAA2006 (which was supposed to be filed by TGB on 30 April 2007 but was only filed by TGB on 2 July 2007) in breach of para 9.23(b) of the listing requirements (LR);

(b) Deviation between the unaudited Fourth Quarterly Results 2006 and AAA 2006 which was more than 30% in breach of para. 9.16(1)(a) of LR;

(c) Delay in filing of First Quarterly Results 2007 (which was supposed to be filed by TGB on 31 March 2007 but was only filed on 15 August 2007) in breach of para. 9.22(1) of LR;

(d) Deviation after restatement to AAA 2005 in breach of para. 9.16(1)(a) of LR.

[27] Though it can be argued that generally a director may rely on judgment, information and advice of management and other officers appropriately trusted, in *Australian Securities and Investments Commission v. Adler* (2002) 41 ACSR 72 it was held that reliance would not be reasonable where directors know, or should have

known by exercise of ordinary care of any fact that would deny such reliance. In that case the court rejected the application of the director to be exonerated from liability. The submission that matters of finance to be left to professional in the area is untenable, when the directors know or ought to know of the concern relating to the AAA, in this case.

[28] Furthermore s. 167 of the Companies Act 1965 imposes obligations on every directors and managers to keep accounts and other records to enable true and fair profit and loss accounts and balance sheet of a company. The failure to comply with this provision is an offence under this section. The legal duty imposed by this section clearly shows that the obligation of the directors in relation to account keeping of the company remains with the directors. With such imposition, the decision of a company cannot place the whole reliance on the financial advisers *per se*. From the facts of the present case it is clear that the charges are substantiated with the facts and the legal duties imposed on the company directors. The enforcement actions by Bursa supported by these facts are made *bona fide*, because there is clear breach of the listing requirements.

Natural Justice

[29] The applicants alleged breach of natural justice against Bursa. The allegations are premised two main grounds. First on the denial of oral submission before the Appeals Committee, and secondly the failure of Bursa to disclose who are the members of the Appeals Committee hearing the appeal.

[30] The allegation of denial of oral hearing was in relation to the hearing before Appeals Committee. On the day of Appeals Committee hearing, solicitor for Gan Boon Aun attended before the Appeals Committee but it was called off, with no reason given. Thereafter the Appeals Committee proceeded and pronounced its decision. It was contended that, by fixing date for the appeal the Appeals Committee gave the impression that the Appeals Committee wanted to give opportunity for oral representation, pursuant to request made by Gan Boon Aun.

[31] It must be borne in mind that Bursa's enforcement proceedings are premised on documentary evidence and written representations of the parties. This is clearly set out in the

"Enforcement Procedures against Director of Listed Issues in Respect of the Alleged Breach of the Listing Requirements of Bursa Malaysia Securities Berhad". It must also be appreciated that the right to natural justice requires a right of fair hearing which cannot be equated with a right to an oral hearing. The hearing can take many forms as decided by the Federal Court in *Ketua Pengarah Kastam v. Ho Kwan Seng* [1975] 1 LNS 72. It was stated in this case that a tribunal fulfils it obligation to hear by giving notice and inviting written response.

[32] In fact in absence of mandatory rule, the right to oral hearing is not an automatic right. So long as fair opportunities are given to the person, the *audi alter partem* rule is considered observed. In this case, Bursa had sufficiently accorded the applicants the right to be heard by allowing them to challenge the evidence tendered against them by putting their cases before the Listing Committee orally.

[33] Gan Boon Aun submitted written representations dated 31 May 2007, 19 July 2007 (in relation to the delay breaches in exh. GBA-3), 20 July 2007 and 8 August 2007 (in relation to the deviation breaches in exh. GBA-3) and was further given a right of oral hearing before the Listing Committee on 28 January 2010. Gan Boon Aun therefore had ample opportunity to put his case before the Listing Committee which included challenging or disputing the evidence against him and tendering his evidence before the Listing Committee.

[34] With regards to appeals before the Appeals Committee, the oral representation before the Appeals Committee is not as of right but is at the discretion of Bursa. The Appeals Committee at its discretion may decide if in its opinion an oral hearing is necessary. This is also clearly set out in the Directors' Enforcement Procedures. A director must ensure that his written representations are complete and comprehensive. In addition to the written and oral representations (at the hearing before the Listing Committee on 28 January 2010), Gan Boon Aun had submitted full written representations. The Appeals Committee had decided that the written representations were sufficiently clear and the issues submitted could be adequately dealt with based on the written representations and documents. In this way the need for further oral clarification do not become necessary.

[35] Gan Boon Aun was informed, by way of letter dated 4 June 2010 that the Appeals Committee had decided to hear the appeal based on written submissions. On 16 June 2011, the management of Bursa responded to Gan Boon Aun's further representations and on 24 June 2010, Gan Boon Aun requested for two (2) weeks to respond. Gan Boon Aun did not request nor insist on oral representation.

[36] Khiudin and Shukri submitted written representations dated 2 March 2010 (through its previous solicitors Messrs Ranjit Singh & Yeoh) (exh. A-5) and written submissions dated 27 May 2010 (through the current solicitors Messrs Guok & Leong) (exh. A-6) and were further given right of oral hearing. The solicitors of the applicants had chosen to leave the hearing of the Listing Committee on 28 January 2010 and cannot now allege that they were not given the opportunity to be heard orally. Further, Khiudin and Shukri did not request for oral representations before the Appeals Committee.

[37] There is no automatic right to an oral hearing under the law. It is the prerogative of the Appeals Committee to allow or disallow a request for an oral hearing and if the Appeals Committee decides not to grant the applicant's request, the Appeals Committee will proceed to consider and determine the matter. From the facts, in my view the applicants were given their rights of hearing and had ample opportunities to put their case before the Listing Committee, including challenging and disputing the evidence before the Listing Committee.

[38] In the leading case of *Ridge v. Baldwin* [1964] AC 40, the House of Lords held that a Chief Constable who was dismissed from his office without any opportunity to put his case or without notice of the proposal, had been treated unfairly and that the rules of natural justice had been ignored. His Lordship in that case promulgated the overall test for procedural fairness as "what a reasonable man would consider to be fair in the particular circumstances".

[39] In the case of *Abdul Rahman Isa v. Public Service Commission* [1991] 2 CLJ 972; [1991] 2 CLJ (Rep) 227 the applicants sought an order of *certiorari* in order to quash the decision of the respondent dismissing him from the public service as a customs officer. The respondent argued that the respondent having decided

to dismiss the applicants after considering his representation had a discretion and was "entitled to disallow the oral hearing requested for" as it had complied with the *audi alteram partem* rule and accordingly there has been no breach of natural justice. KC Vohrah J (as he then was) agreed with the arguments of the respondent in that case:

> When the show cause letter was sent and the exculpatory letter furnished with a request for an oral hearing there was no obligation on the part of the Respondent to grant an oral hearing. The Respondent was entitled to deliberate and decide on the representation as it stood. It was held in that case that, the Applicant was not entitled as a matter of right to an oral hearing and the decision of the Respondent cannot be said to have been made in breach of natural justice just because it was arrived at without oral hearing he had requested.

[40] In the circumstances, in my view there is sufficient opportunity given to all the applicants to present their respective cases, and hence the right of hearing has indeed been complied with by Bursa.

Non Disclosure Of AC Members

[41] The applicants alleged breach of natural justice on the part of Bursa, when it did not disclose who the members of the Appeals Court were. The applicant contended that the failure to disclose the names of members of the Appeals Committee had deprived them of the opportunity of raising potential bias. It must be noted that there is no obligation on Bursa to disclose the names of the members of Appeals Committee. Besides, the applicants had not at any point in time, requested or were interested to know also the members of Appeals Committee, deciding on their appeals.

[42] When the case was stood down for decision, additional submission was made by learned counsel for Bursa, where all the Appeals Committee members' names were disclosed. Time was given to the applicants to reply further to the additional submission, with a new dated fixed for learned counsel for the applicants to seek instruction on the same. The applicants could have raised issue of biasness if they so wish. However the reply submission by the applicants does not raise such issue. The submission by the applicants centred on the issue that the fact

that Bursa discloses the name shows that Bursa also agreed with the submission of applicants that they had failed to comply with rules of natural justice.

[43] For a case of bias to be established, the burden rests on the applicants to show proof. Case laws show that the burden to be discharged for allegation of bias in a tribunal is more stringent than in the court. The Federal Court in *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701 applied the test of real danger of bias. In the case of a tribunal however actual bias is necessary to be proved, as seen in the decision of the Supreme Court of Western Australia in *Rush v. WA Amateur Football League Inc* [2005] WASC 206. The law as explained by the Supreme Court in that case is clearly stated in the judgement of Dixon J as follows:

> The only legally operative bias from the standpoint of natural justice was the actual bias of Doherty which had assumed invincible proportions. It seems clear that, if the actual bias of Doherty was necessary to vitiate the proceedings of the tribunal, the bias as to which all the others must have come under reasonable suspicion could not have been either relevant to disqualify them or sufficient to invalidate what they decided.

[44] Also in *R v. Nailsworth Licensing Justices ex parte Bird* [1953] 2 All ER 652 it was held that to justify setting aside of a decision of the licensing committee in that case there must be something in the nature of real bias and the objection could and should have been made before the decision had been announced.

[45] Thus an allegation of bias cannot be made on mere misapprehension that the disclosure of the names of the members of the Appeals Committee would proof bias. The allegations must be substantiated and cannot be speculated on undisclosed basis. In a domestic tribunal as opposed to court, actual bias as opposed to apprehended bias is necessary to be established. The applicants here had never shown any interest or made make any request to find out who were the Appeals Committee members who deliberated on their appeals, till up to the hearing of this application. The right to contend bias should have been made before the decision is announced following *R v Nailsworth Licensing Justice ex parte Bird* [1953] 2 All ER 652. It would have been different if the applicants had shown interest to find out who were

the Appeals Committee members before a decision was announced. In absence of such request for disclosure the applicants' contention remained a mere possibility and thus, far from discharging the burden it remains speculative.

Penalties

[46] Learned counsel for the applicants urged this court to review the penalties imposed by Bursa on the grounds of them being excessive, unreasonable, and unprecedented. It was argued that Bursa erred in law and had acted in excess of its jurisdiction, after arriving at an erroneous decision, imposed penalties which are arbitrary, unjust and not in line with precedents. Further to that learned counsel contended that the daily penalty imposed on Gan Boon Aun should not go beyond the date he resigned from his executive duties or from the position of CEO on 19 June 2007.

[47] It must first be noted that Bursa is empowered under para. 16.17(1)(b) of the listing requirements to impose fine not exceeding RM1,000,000. This limit had not been exceeded by Bursa in this case.

[48] In arriving at the penalties imposed, Bursa had taken into account the significant variance involved between the Transmile's audited account and restated account of RM453,949,000 for the financial year ended 31 December 2005 as well as the difference of RM283,867,000 between Transmile's unaudited and audited results for financial year ended 31 December 2006. These definitely impacted the share price of Transmile in the market very significantly as highlighted in para. 52 of Bursa's management submission before the Appeals Committee. The investors and shareholders at large were relying on this information, and Bursa has a duty to protect all of them.

[49] It must be born in remind that, it remains the statutory duty of Bursa to maintain an efficient, well informed competitive market for securities trading. Towards this objective Bursa will have to enforce various rules and regulations pertaining to the conduct of listed companies. In enforcing these rules Bursa has its own internal procedures which it has complied. At the same time Bursa would have to take swift action to enforce any breach of any listing requirements.

[50] The applicants tabulated the penalties imposed by Bursa in earlier cases to compare and to drive a point that the penalties on the applicants are excessive and not in line with the earlier cases. In my view there is no basis for such comparison. After all no two cases are the same, and there are material difference between one case to another.

[51] The contention that daily penalty should cease upon resignation is to my mind, a flawed suggestion. If an imposition for daily breaches stops upon resignation of a director then it will encourage anyone taken to task by Bursa for breaches of listing requirements to just hand in his resignation in order to escape liability. If such is allowed, it will defeat the whole purpose of the enforcement proceedings. Breaches took place when the applicants were in the position to rectify. They must be responsible for their failures. They cannot in the face of an action by Bursa resign and claim to be no longer in control of the accounts. It would therefore be appropriate that the penalties run until the breaches are remedied not after the resignation. To allow the directors to take the easy way out by just resigning from their positions upon being charged would encourage shirking of responsibilities and duties through an easy escape route.

[52] The sufficiency or otherwise of penalty imposed on any breach of listing requirements must lie with Bursa. Bursa should be allowed to exercise its discretion in line with the objective it must achieve. In this case the deviation shows a difference of RM453,949 million between Transmile's audited and restated audited results for the financial year ended 31 December 2005 which represents a variance of approximately 537.9%. The deviation or difference of RM283,867 million between Transmile's unaudited and audited results for the financial year ended 31 December 2006 represents a variance of approximately 180.2%. This comes up to an alarming figure of RM737,816 million. Such deviation is alarming and certainly impacted on investors and shareholders at large. Stringent penalties may be necessary to discourage such incidences otherwise, market confidence cannot be achieved.

Non Interference By Court

[53] The court had shown reluctance in interfering with Bursa's decision in enforcing its objective done in good faith. The principle of non interference is premised on the basis that Bursa is a

regulatory body mandated under the law to maintain and promote the interests of public members dealing on the exchange, and should be left to carry its objectives unless it acted in excess of jurisdiction. The Court of Appeal in *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698 adopted the same position. This was echoed in all the later decisions of the High Court in *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Bhd* [2010] 6 CLJ 581, *Syarikat Kayu Wangi Berhad v Bursa Malaysia Berhad* (Civil Suit No. MT FLJC 13 June 2007), *Tan Sri Dato' Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd* [2011] 7 CLJ 215; [2011] 1 LNS 102.

[54] Similar stance is taken in other Commonwealth jurisdiction such as United Kingdom, Australia and New Zealand. In the Australian case of the *Kwikasair Industries Ltd v. Sydney Stock Exchange Limited BC6800002* [1968] CCH ASLC 30, the court refused to overturn the decision of exchange and Street CJ in that case observed that the stock exchange is not only entitled but duty bound to be concerned with maintaining of fair market which is predominant amongst all its objectives. His Lordship further observed in that case that, so long as it remains with its main objective the members of its committee should be left to exercise honestly their powers unencumbered by the prospect of having to face litigious investigation of correctness of their decision. In *R v. International Stock Exchange of UK and Ireland Ltd, ex parte Else Ltd* [1993] 1 QB 534, it was observed by Lord Bingham that, "the court will not second-guess the informed judgment of responsible regulators steeped in knowledge of their particular market". These cases demonstrate the attitude of the courts in reviewing the decision made by the exchange in different jurisdiction.

[55] For the above reasons, it is clear that the applicants had failed to establish the grounds raised against the respondent. In view of that, this court, in line with all the above decisions should remain reluctant to interfere with the decision of Bursa. I therefore dismiss the application in Suit No. R2-25-466-2010 and in Suit No. R2-25-467-2010 with costs of RM2,000 against each applicant.